In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1360

JOE AND WANDA KABINTO, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 456 F. 2d 1087. The unreported judgment and order of the district court appears at Pet. App. B.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1972, and rehearing was denied on March 23, 1972. The petition for a writ of certiorari was filed on April 22, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

468-166—72

QUESTION PRESENTED

Whether the decision of a special three-judge court in *Healing* v. *Jones,* 210 F. Supp. 125, affirmed *per curiam,* 373 U.S. 758, holding that the Hopi Indian Tribe had exclusive rights of use and occupancy of Land Management District 6, bars claims of individual Navajos to that land as *res judicata.*

STATUTE AND EXECUTIVE ORDER INVOLVED

The Act of July 22, 1958, 72 Stat. 403, reads as follows:

AN ACT

To determine the rights and interests of the Navaho Tribe, Hopi Tribe, and individual Indians to the area set aside by Executive order of December 16, 1882, and for other proposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That lands described in the Executive order dated December 16, 1882, are hereby declared to be held by the United States in trust for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive order. The Navaho Indian Tribe and the Hopi Indian Tribe, acting through the chairmen of their respective tribal councils for and on behalf of said tribes, including all villages and clans thereof, and on behalf of any Navaho or Hopi Indians claiming an interest in the area set aside by Executive order dated December 16, 1882, and the Attorney General on behalf of the United States, are each hereby authorized to commence or defend in the United States District Court for the District of Arizona an

action against each other and any other tribe of Indians claiming any interest in or to the area described in such Executive order for the purpose of determining the rights and interests of said parties in and to said lands and quieting title thereto in the tribes or Indians establishing such claims pursuant to such Executive order as may be just and fair in law and equity. The action shall be heard and determined by a district court of three judges in accordance with the provisions of title 28, United States Code, section 2284, and any party may appeal directly to the Supreme Court from the final determination by such three judge district court.

SEC. 2. Lands, if any, in which the Navaho Indian Tribe or individual Navaho Indians are determined by the court to have the exclusive interest shall thereafter be a part of the Navaho Indian Reservation. Lands, if any, in which the Hopi Indian Tribe, including any Hopi village or clan thereof, or individual Hopi Indians are determined by the court to have the exclusive interest shall thereafter be a reservation for the Hopi Indian Tribe. The Navaho and Hopi Tribes, respectively, are authorized to sell, buy, or exchange any lands within their reservations, with the approval of the Secretary of the Interior, and any such lands acquired by either tribe through purchase or exchange shall become a part of the reservation of such tribe.

SEC. 3. Nothing in this act shall be deemed to be a congressional determination of the merits of the conflicting tribal or individual Indian claims to the lands that are subject to adjudication pursuant to this Act, or to affect the liability of the United States, if any, under

litigation now pending before the Indian Claims Commission.

The Executive Order of December 16, 1882, reads as follows:

> MOQUI (OR HOPI) RESERVATION.
>
> EXECUTIVE MANSION,
> *December 16, 1882.*
>
> It is hereby ordered that the tract of country in the Territory of Arizona lying and being within the following-described boundaries viz, beginning on the one hundred and tenth degree of longitude west of Greenwich, at a point 36° and 30′ north; thence due west to the one hundred and eleventh degree of longitude west; thence due south to a point of longitude 35° 30′ north; thence due east to the one hundred and tenth degree of longitude west; thence due north to the place of beginning, be, and the same is hereby, withdrawn from settlement and sale, and set apart for the use and occupancy of the Moqui and such other Indians as the Secretary of the Interior may see fit to settle thereon.
>
> CHESTER A. ARTHUR.

STATEMENT

The United States, on behalf of the Hopi Indian Tribe, brought this action of ejectment against 16 Navajo Indians occupying a portion of the Hopi Indian Reservation designated as Land Management District 6. The district court granted a summary judgment of ejectment declaring the 16 Navajos to be trespassers and enjoined them from using or occupying the land. The court of appeals affirmed.

The facts, which are essentially undisputed, are summarized in the opinion of the court of appeals. In 1882, by Executive Order, President Chester A. Arthur set aside a 2½ million-acre tract in northeastern Arizona, for the use and occupancy of the Hopi Indian Tribe "and such other Indians as the Secretary of the Interior may see fit to settle thereon." By the Act of July 22, 1958, 72 Stat. 403, Congress declared that tract to be held in trust by the United States for the Hopi and other Indians settled there pursuant to the Executive Order, and authorized the tribal chiefs of the Hopi and Navajo Indian Tribes to bring suit before a special three-judge court "to determine the rights and interests of the Navajo Tribe, Hopi Tribe and individual Indians * * * " in the tract. In the suit that was brought pursuant to the Act, the three-judge district court held that the Hopi Indians had exclusive rights of occupancy of Land Management District 6 and quieted title to all those lands in favor of the Hopis. *Healing* v. *Jones,* 210 F. Supp. 125 (D. Ariz.), affirmed *per curiam,* 373 U.S. 758.[1]

In the present case, the district court, on the authority of *Healing,* granted summary judgment in favor of the Hopis. The Navajos appealed, arguing (1) their right to aboriginal occupancy of the land was not extinguished by *Healing;* (2) the subject matter of the litigation is not judicially cognizable; (3) they were inadequately represented in *Healing* because their representative did not assert individual,

[1] The district court's unreported findings of fact and conclusions of law in *Healing* appear at Pet. App. C.

as opposed to tribal, claims; (4) the Act of July 22, 1958, and *Healing* deprived them of property without due process of law; and (5) the United States must do equity.

The court of appeals affirmed, holding: (1) the claims of aboriginal title which had been considered and rejected in *Healing* were *res judicata;* (2) the argument that the subject matter of this litigation is not judicially cognizable had been decided adversely to the Navajo Indians in a prior *Healing* decision (174 F. Supp. 211 (D. Ariz.)); (3) the Chairman of the Navajo Tribe in *Healing* had properly made no claim on behalf of any individual Navajos because Congress, in the Act of July 22, 1958, had determined the rights of the Navajos to be tribal; (4) the claim that the Act of July 22, 1958, had extinguished the aboriginal rights of these Navajos without just compensation, too, was *res judicata,* and, in any event, aboriginal title is not a property right but only a permissive right of occupancy which may be terminated by the sovereign without compensation; and (5) with respect to the claim that the United States must do equity, first, the Ninth Circuit generally will not reverse on an issue raised for the first time on appeal and, second, there was nothing to indicate that the United States would not fulfill its fiduciary obligations to these individual Navajos when this litigation is terminated.

ARGUMENT

In this Court petitioners contend that their claims of vested individual rights of occupancy pursuant to Secretarial settlement under the 1882 Executive Order

are not *res judicata* because only tribal claims were asserted in *Healing* (Pet. 17, 20–23). Alternatively, they contend that their claims arose independently of the 1882 Order and are therefore unaffected by the *Healing* judgment (Pet. 16, 23–27). The former claim fails because the Navajo rights, if any, to the land in question were—as the court in *Healing* found—tribal in nature. The latter claim is barred because the issue of Indian title—as well as rights under the 1882 Executive Order and the Act of July 22, 1958—were decided adversely to petitioners in *Healing*.

In *Healing* the court found that "[n]either the Navajo Indian Tribe *nor any individual Navajo Indians* have the exclusive interest in or to any part of the 1882 reservation" (Concl. of Law 13) and that such rights as the Navajos had—which were common use of reservation lands outside Land Management District 6—were tribal in nature (Concl. of Law 14). As the court stated in *Prairie Band of Potawatomi Indians* v. *United States*, 143 Ct. Cls. 131, 143, "The tribal right to use is communal. No instance is known of individual ownership in tribal lands." See also *Whitefoot* v. *United States*, 155 Ct. Cls. 127, 135, 293 F. 2d 658, 661–662. It was in recognition of this fact that the Navajo representatives in *Healing* asserted only tribal claims. As the court below reasoned (Pet. App. A6):

> The reason why the claims of individual Navajos were made as beneficiaries under the Navajo tribal claim is that the Act of July 22, 1958, provided in Section 2 that "Lands, if any, in which the Navaho Indian tribe or indi-

> vidual Navaho Indians are determined by the court to have the exclusive interest shall thereafter be a part of the Navaho Indian Reservation". The strategy of the Chairman of the Navajos was dictated by the mandate of Congress, and not by reason of any conflict of interest, for Congress determined the rights of the Navajos to be tribal.

The common interest of the entire tribe having been adequately asserted by the chairman of the tribal council, petitioners, as members of the tribe, are bound by the prior final judgment. *Commissioner* v. *Sunnen,* 333 U.S. 591, 597; *Cromwell* v. *County of Sac,* 97 U.S. 351, 352.

Petitioners' claim of rights in the land under Indian title, independent of the 1882 Order and 1958 Act, was considered and rejected in *Healing.* The matter is therefore *res judicata.* As the court below found (Pet. App. A3), the primary claim of the Navajos in *Healing* was that occupancy "in Indian fashion" constituted settlement under the language of the 1882 Order and "liken[ed] the character and use and occupancy by 'other Indians' contemplated by the order to that which must be found to exist in order to establish aboriginal Indian title." In rejecting this contention the *Healing* court found (Concl. of Law 3):

> Neither the Navajo Indian Tribe nor any individual Navajo Indians, whether or not living in the reservation area in 1882, gained any immediate rights of use and occupancy therein by reason of the issuance of the Executive Order of December 16, 1882, *or by reason of any other fact or circumstance,* save and except by the

exercise, after December 16, 1882, of the authority reserved in the Secretary of the Interior, under the Executive Order of December 16, 1882, to settle other Indians in that reservation.

Accordingly, the court of appeals here correctly concluded: "It thus appears that the claims which appellants make here with reference to aboriginal claims were raised and considered at length by the *Healing* court and decided adversely to them" (Pet. App. 5A).[2]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1972.

[2] Petitioners' reliance (Pet. 14–16, 23–25) on *Cramer* v. *United States*, 261 U.S. 219, is misplaced. *Cramer* was an action brought by the United States against a railroad to protect an Indian title not extinguished by the United States. Here, *Healing* held that the 1882 Executive Order created non-vested rights in the Hopis only, that any Navajos then residing there remained by sufferance, and that subsequently Navajos obtained rights by Secretarial settlement on lands outside District 6. (See Fdgs. of Fact 16–19, 36–40, 42.)

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